No. 03-__ 03 130 JUL 23 2003

In The
Supreme Court of the United States

IRWIN J. CAMPBELL, J.C. LAWYER, BACKUS FERGUSON, and THOMAS HANAHAN, III,

Petitioners,

v.

HILTON HEAD NO. 1 PUBLIC SERVICE DISTRICT and BEAUFORT COUNTY, SOUTH CAROLINA

On Petition For A Writ Of Certiorari To The Supreme Court Of South Carolina

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Are individual claims for violations of the Constitution's Republican Guarantee Clause, as raising federal rights under 42 U.S.C. § 1983, justiciable by state courts?

2. Does a state's systematic creation and maintenance of unelected and unaccountable entities levying taxation without representation violate the Republican Guarantee Clause?

LIST OF PARTIES BELOW

The parties to this case below are as reflected in its caption.

The named plaintiffs, Petitioners here, were certified by the South Carolina Court of Common Pleas of Beaufort County as a class, representing themselves and all others similarly situated. See App. 4a. This class certification was appealed to the South Carolina Supreme Court, but in view of that tribunal's ruling on the merits of the case, no review of that order was made. See App. 9a-10a.

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PETITION FOR WRIT OF CERTIORARI

The Petitioners, Irwin W. Campbell, J.C. Lawyer, Backus Ferguson, and Thomas Hanahan, III, respectfully pray that a writ of certiorari issue to review the April 28, 2003, judgment and opinion of the Supreme Court of South Carolina in the above-captioned proceeding.

OPINIONS BELOW

The opinion and judgment of the South Carolina Supreme Court of April 28, 2003, *Campbell v. Hilton Head No. 1 Public Service District*, Docket No. 25635, is reported at 580 S.E.2d 137 (S.C. 2003), and is reprinted at App. 1a.

The judgment and order of the South Carolina Court of Common Pleas, Beaufort County, Judge Perry M. Buckner, presiding, of December 12, 2001, was unreported, but is reprinted at App. 11a.

STATEMENT OF JURISDICTION

Petitioner seeks review from the opinion and judgment of the Supreme Court of South Carolina of April 28, 2003. The U.S. Supreme Court has jurisdiction to review cases from state courts by virtue of 28 U.S.C. § 1257(a) (2000).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

This Petition implicates the power of state courts to consider individual claims arising under the Republican Guarantee Clause of Article IV, section 4 of the federal Constitution: "The United States shall guarantee to every state

in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence." U.S. CONST. art. IV, § 4.

The avenue by which the Republican Guarantee Clause is justiciable at the instance of private parties is as a vindication of federal rights under 42 U.S.C. § 1983 (2000), which provides in pertinent part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT

1. a. The South Carolina Constitution, like that of a number of states of the Union,[1] prohibits the raising of taxes by unelected bodies or for non-public purposes. See S.C. CONST. art. X, § 5 ("No tax . . . shall be established, fixed, laid or levied, under any pretext whatsoever, without the consent of the people or their representatives lawfully assembled. Any tax which shall be levied shall distinctly state the public purpose to which the proceeds of the tax shall be applied.").

[1] See, e.g., ARK. CONST. art. 2, § 23; ME. CONST. art. 1, § 22; MASS. CONST., pt. I, art. XXIII; N.H. CONST., pt. 1, art. 28; N.C. CONST. art. I, § 8; OR. CONST. art. I, § 32; S.D. CONST. art. 6, § 17; VT. CONST. ch. 1, art. 9; WYO. CONST. art. 1, § 28. See also N.Y. CIV. RIGHTS LAW § 3 (Bill of Rights).

Despite this proscription, the South Carolina legislature created in 1969 the Hilton Head No. 1 Public Service District (District), a Respondent here, as a special purpose district to supply water and sewer services to the northern portion of Hilton Head Island. The District was governed and managed by a commission whose members were appointed by the Governor, upon the recommendation of the Beaufort County legislative delegation. Prior to 1998, the District directly levied taxes on property within the District's service area. The other Respondent, Beaufort County (County), collected the taxes raised by the District.

b. In 1997, the South Carolina Supreme Court considered a challenge to the constitutionality of another entity, the Richland County Recreation Commission, also established in 1969, see S.C. Acts 317, 1969 S.C. Acts 382, and which was identically structured and empowered as Hilton Head No. 1 Public Service District. In *Weaver v. Recreation District*, 492 S.E.2d 79 (S.C. 1997), the South Carolina Supreme Court ruled that such commissions and districts violated of the South Carolina Constitution's ban on taxation without representation. The *Weaver* decision did not, however, operate retrospectively. The South Carolina Supreme Court noted that

> We are cognizant . . . of the disruptive effect today's holding could have on the financial operation of numerous special purpose districts, local commissions and boards throughout this state. Accordingly, in order to give the General Assembly an opportunity to address this problem, we hold this decision shall be applied prospectively beginning December 31, 1999.

Id. at 82.

In response, the South Carolina legislature adopted a statute in 1998 that removed the autonomous taxing power from appointed bodies such as the District. See S.C. Code Ann. § 6-11-271 (Supp. 2002), reprinted at App. 19a. The 1998 Act gave legislative imprimatur and authorization to unelected South Carolina tax districts and commissions to collect a specified millage rate, and provided that any increase had to be approved either by referendum of the residents of the special purpose district or by the relevant county commission. Id. §§ 6-11-271(C), (D) & (E); App. 19a-20a. The lawfulness of this revised scheme is not in question here.

2. a. As the court below acknowledged, the facts of the case are undisputed. App. 1a n.1. The individual Petitioners, and the class they represent, are people who own real or personal property located in the District, and who were taxed by an unelected body on such property in the years 1995 through 1998, and did not receive water or sewer service from the District. Indeed, despite being taxed during this period, the named plaintiffs still do not receive any water or sewer service from the District. App. 3a. Plaintiffs sought a refund for the taxes illegally levied by the District, as unconstitutionally established prior to 1998.

b. Plaintiffs brought complaints in federal and state court, each alleging several causes of action. The state court case was removed to federal court, consolidated with the federal case, and then eventually remanded to state court. See *Lawyer v. Hilton Head Public Serv. Dist. No. 1*, 220 F.3d 298 (4th Cir. 2000), aff'g, *Campbell v. Hilton Head No. 1 Public Serv. Dist.*, 114 F. Supp.2d 482 (D.S.C. 1999). The U.S. Court of Appeals for the Fourth Circuit held that a federal action for a tax refund was barred by the Tax Injunction Act, 28 U.S.C. § 1341, and that South Carolina law provided adequate remedies for such refunds, including consideration by state courts of

plaintiffs' section 1983 claims. See 220 F.3d at 301-02, 304-06.

Upon remand of the case to the Court of Common Pleas of Beaufort County, both plaintiffs and defendants moved for summary judgment. After a hearing before the trial court, it was agreed that the remaining issue for consideration was whether the District's taxation prior to 1998 constituted a violation of a federal right, such as to give rise to a cause of action under 42 U.S.C. § 1983. App. 12a. After considering the nature of federal rights protectable under section 1983, App. 15a-16a, the Court of Common Pleas ruled that

> The continued taxation [by the District] without representation is a violation of the Fourteenth Amendment of the United States Constitution, which prohibits any state from enforcing laws that abridge a citizen's privileges. Taxation with[] representation is one of the founding privileges of this Country. This privilege is embodied in Article IV, Section 4 of the Federal Constitution, which guarantees our citizens a republican form of government.

App. 16a. The trial court went on to consider the original intent of the Republican Guarantee Clause, and recent jurisprudence interpreting that provision to invalidate forms of state legislation. See App. 16a-17a (citing *VanSickle v. Shanahan,* 511 P.2d 223, 243 (Kan. 1973); *Kelley v. Metropolitan County Bd. of Education of Nashville and Davidson County,* 836 F.2d 986, 997 (6th Cir. 1987)). The Court of Common Pleas thus granted summary judgment to the plaintiffs.

c. The District and County undertook a direct appeal

to the South Carolina Supreme Court,[2] which reversed and ordered that judgment be entered for the District and County. App. 10a. The South Carolina Supreme Court concluded that there was no express constitutional guarantee to taxation with representation. App. 5a.

The South Carolina Supreme Court began with the premise that because "[b]y its express terms, th[e] [Republican Guarantee] clause does not guarantee against taxation without representation," it could not give rise to a federal right enforceable under section 1983. App. 5a. Relying on a set of this Court's precedents dealing with taxation within the District of Columbia or federal territories – areas not "States" within the meaning of the Republican Guarantee Clause and not subject to the same taxation strictures – the South Carolina Supreme Court reached the conclusion that the doctrine of taxation without representation has no constitutional basis. See App. 5a-8a. The South Carolina Supreme Court also rejected language in an opinion of the U.S. Court of Appeals for the Sixth Circuit, suggesting that taxation without representation would constitute a violation of the Republican Guarantee Clause. See App. 8a (distinguishing *Kelley v. Metropolitan County Bd. of Education of Nashville and Davidson County,* 836 F.2d 986, 997 (6th Cir. 1987)).

Despite its manifest ruling on the merits of plaintiffs' Republican Guarantee Clause argument, the South Carolina Supreme Court appeared to harbor some doubts about the justiciability of such claims. These concerns were expressed

[2] Also appealed was the trial court's grant of class certification to the plaintiffs. In view of the South Carolina Supreme Court's disposition of the case, App. 9a-10a, no review was made of the certification, and this issue is not before the Court.

in the final footnote of the opinion:

> In addition, we note that claims made pursuant to the Republican Guarantee Clause generally have been held by the USSC [U.S. Supreme Court] to be nonjusticiable, political questions. *See, e.g., Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912); *see also Baker v. Carr*, 369 U.S. 186, 223-24 (1962) (stating the USSC has "consistently held that a challenge to state action based on the Guaranty Clause presents no justiciable question") (and cases cited therein); *Adams v. Clinton*, 90 F.Supp.2d at 71; *but see New York v. United States*, 505 U.S. 144, 185 (1992) (questioning whether all claims under the Republican Guarantee Clause present nonjusticiable, political questions).

App. 9a n.7. The South Carolina Supreme Court did not otherwise indicate if the potential lack of justiciability of the Guarantee Clause issue affected its substantive analysis of the case.

REASONS FOR GRANTING THE PETITION

COURTS ARE DIVIDED AS TO THE EXTENT OF THE GUARANTEE CLAUSE'S JUSTICIABILITY AND SUBSTANTIVE CONTENT

This Petition calls upon the Court to answer an enduring constitutional riddle: whether, and to what extent, the Republican Guarantee Clause of Article IV provides an independent ground for restraining certain forms of governmental action. The South Carolina Supreme Court's

opinion, for which review is sought, highlights the contrasting approaches taken by state supreme courts and federal appeals courts on the justiciability of Guarantee Clause issues. In making the substantive ruling it does – that the principle of taxation with representation has no constitutional basis giving rise to a federal right under section 1983 – the South Carolina Supreme Court has profoundly misapprehended the appropriate analysis that state tribunals should undertake in ascertaining whether particular governmental conduct is antithetical to a "republican form of government" under Article IV, section 4 of the federal Constitution.

A. In the Wake of *New York v. United States*, State Courts Routinely Entertain Guarantee Clause Claims, and Federal Courts Implicitly Endorse Such Review.

1. Whether intended or not, this Court's own pronouncements have given rise, Lazarus-like, to a vibrant jurisprudence by state courts of individual claims brought pursuant to the Republican Guarantee Clause. It is now time for this Court to either give its blessing to this development – and to prescribe a general approach for state courts to construe the Guarantee Clause's protections – or to slam the door shut on the justiciability of individual claims brought under the Clause.

Generations of judges, lawyers, and constitutional scholars have taken it as an article faith that, without exception, the Republican Guarantee Clause implicates nonjusticiable, political questions. Dating back to its *locus classicus* of *Luther v. Borden*, 48 U.S. (7 How.) 1, 42 (1849), this doctrine has assumed that it is Congress that is in the sole position to judge whether a state has a "republican form of government," and the consequences if it does not. Nonetheless, some early decisions

of the Court appeared to assume that the Guarantee Clause was justiciable, if even only to a limited degree. See *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 176 (1874) (considering state constitutions at the time of the Framing on the issue of female suffrage); *Duncan v. McCall*, 139 U.S. 449, 462 (1891) (appearing to reject a Guarantee Clause argument on its merits); *Forsyth v. City of Hammond*, 166 U.S. 506, 519 (1897) ("The preservation of legislative control in such matters is not one of the essential elements of a republican form of government which, under section 4 of article 4 of the constitution, the United States are bound to guaranty to every state in this Union. . . ."); *Attorney General of the State of Michigan ex rel. Kies v. Lowrey*, 199 U.S. 233, 239 (1905) ("the action of the legislature is compatible with a republican form of government even if it be admitted that § 4, article 4, of the Constitution, applies to the creation of, or the powers or rights of property of, the subordinate municipalities of the state.").

It was in the early part of the twentieth century that this Court came to routinely disclaim the justiciability of Guarantee Clause claims as political questions. See *Taylor & Marshall v. Beckham*, 178 U.S. 548, 578-79 (1900); *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 133, 148-51 (1912). Nonetheless, the contours of the political question bar to the justiciability of certain cases by federal courts was fundamentally altered in *Baker v. Carr*, 369 U.S. 186 (1962). And after the Court in *Baker* reviewed the line of Guaranty Clause cases, from *Luther v. Borden* to *Pacific States*, it concluded that there might not, after all, be a categorical ban on the justiciability of that constitutional provision. First, the Court observed that "the implication of the Guaranty Clause in a case concerning congressional action does not always preclude judicial action." Id. at 226 n.53. Second, for those cases where a Guaranty Clause claim was conjoined with an

assertion of a right under the Fourteenth Amendment, the political nature of the controversy would be independently evaluated. See id. at 226-28. Lastly, there is at least a suggestion in the *Baker* opinion that the political question doctrine is a judge-made doctrine of rectitude for the federal courts, and is not applicable to individual claims brought in state tribunals, and the existence of such a justiciability bar would not disqualify Supreme Court review of such state court decisions. See id. at 198-203. *Baker*'s retraction of a sweeping prohibition on courts hearing Guaranty Clause cases was confirmed by this Court in *Reynolds v. Sims*, 377 U.S. 533, 581-82 (1964) ("As we stated in *Baker v. Carr*, some questions raised under the Guaranty Clause are nonjusticiable, where 'political' in nature and where there is a clear absence of judicially manageable standards.").

2. So matters stood prior to this Court's recent decision in *New York v. United States*, 505 U.S. 144 (1992). In that case, New York asserted both a Tenth Amendment anti-commandeering and Guarantee Clause challenge to Congress's action in requiring the states to take title to low-level radioactive waste. See id. at 149, 183-84. In the *New York* opinion, Justice O'Connor writing, the Court carefully canvassed the doctrinal history of Guarantee Clause justiciability, and again concluded that "not all claims under the Guarantee Clause present nonjusticiable political questions." Id. at 184-85 (citing *Reynolds*, 377 U.S. at 582; *Kies*, 199 U.S. at 233; *Forsyth*, 166 U.S. at 519; *Duncan*, 139 U.S. at 461-62; and *Minor*, 88 U.S. (21 Wall.) at 175-76).

As to whether New York's Guarantee Clause claim was justiciable, the Court concluded:

> We need not resolve this difficult question today. Even if we assume that petitioners' claim is justiciable, neither the monetary incentives provided

> by the Act nor the possibility that a State's waste producers may find themselves excluded from the disposal sites of another State can reasonably be said to deny any State a republican form of government. . . . Thus even indulging the assumption that the Guarantee Clause provides a basis upon which a State or its subdivisions may sue to enjoin the enforcement of a federal statute, petitioners have not made out such a claim in these cases.

Id. at 185-86.

3. In response to *New York v. United States*, the federal courts of appeals and state supreme courts have been bitterly divided as to whether certain sorts of Guarantee Clause claims are justiciable. This schism in the case law has developed along a few lines of doctrinal fracture.

a. A majority of the federal courts of appeals to have considered the matter have construed this Court's language in *New York* as permission to consider the merits of Guarantee Clause claims, even those raised by individuals challenging state government action, in appropriate circumstances and without regard to some sort of categorical bar. The Third Circuit Court of Appeals has clearly staked out this position. See *State of New Jersey v. United States*, 91 F.3d 463, 468-69 (3d Cir. 1996) (citing *New York* as justification to rule on the state's assertion that the federal government's failure to control immigration of illegal aliens constituted a denial of republican government in the states); see also *Bauers v. Heisel*, 361 F.2d 581, 588-89 (3d Cir. 1966) (employing the Guarantee Clause as a rule of substantive construction in interpreting section 1983, even while noting that an individual challenge to state action, based on section 1983 and the Guarantee Clause, would be justiciable).

Other circuits have been somewhat more circumspect

than the Third in entertaining Guarantee Clause claims, post-*New York*, but clearly have taken the view that they have license to do so. A number of decisions have taken the tack of this Court in *New York*: even while expressing some concerns about justiciability, they have ruled on the merits of the underlying Guarantee Clause claim. See, e.g., *United States v. Vazquez*, 145 F.3d 74, 83-84 (2d Cir. 1998) ("Even if we assume that Vazquez's claim is justiciable, we are not persuaded that Connecticut's voluntary decision to join with the federal government as a plaintiff in this civil action can reasonably be said to deprive Connecticut's citizens of a republican form of government."); *Padavan v. United States*, 82 F.3d 23, 28 (2d Cir. 1996) ("While it is possible that 'perhaps not all claims under the Guarantee Clause present nonjusticiable political questions,' see *New York v. United States*, 505 U.S. 144, 185, (1992), there is no basis for us to say that the plaintiffs here have presented a justiciable claim. Furthermore, nothing in their complaint indicates in any way that federal immigration policies are depriving New York State of a republican form of government.").

The Fifth, Seventh, and Ninth Circuits appear to have adopted the view that a Guarantee Clause claim might be justiciable, but have preferred to simply reject on the merits those arguments they have found to be either inchoate or frivolous. See *Deer Park Independent School Dist. v. Harris County Appraisal Dist.*, 132 F.3d 1095, 1099 (5th Cir. 1998) (Guarantee Clause claim not elaborated); *Travis v. Reno*, 163 F.3d 1000, 1007 (7th Cir. 1998) ("we . . . see little merit to the contention."); *California v. United States*, 104 F.3d 1086, 1091 (9th Cir. 1997) ("nothing in this record other than a mere bare contention that the federal government's policies deny California a republican form of government.").

The Tenth Circuit has been express, however, in the

view that the nub of this justiciability issue lies in the proper interpretation of this Court's opinion in *New York v. United States*:

> In *New York*, the Supreme Court discussed, but did not resolve, the question of whether claims under the Guarantee Clause are justiciable. 505 U.S. at 182-86. In particular, the Court noted that, since its decision in *Luther v. Borden*, 7 How. 1 (1849), there has been some belief that violations of the Guarantee Clause cannot be challenged in the courts because they present nonjusticiable political questions. 505 U.S. at 184-85. Continuing, the Court noted it has suggested, in more recent opinions, that this belief may be incorrect, and that "not all claims under the Guarantee Clause present nonjusticiable political questions." Id. . . . Assuming, without deciding, that plaintiffs' claim is justiciable, there appears to be no merit to it.

Kelley v. United States, 69 F.3d 1503, 1510-11 (10th Cir. 1995).

Finally, those courts of appeals that have rejected the justiciability of Guarantee Clause cases in some instances have declined, following this Court's decision in *New York*, to rule out other situations where such claims might be heard. In *Texas v. United States*, 106 F.3d 661 (5th Cir. 1997), the Fifth Circuit held:

> Although the Supreme Court has suggested that perhaps not all claims under the guaranty clause present nonjusticiable political questions, in the main the Court has found that such claims are not judicially enforceable. . . . The State suggests no manageable standards by which a court could decide the type and degree of immigration law enforcement that would suffice to comply with its strictures. Whatever might be the decision in other cases in other settings, we are persuaded that the case now

> before us does not present a justiciable claim of violation of the guaranty clause.

Id. at 666-67 (citing *New York*, 505 U.S. at 182-86); see also *Chiles v. United States*, 69 F.3d 1094, 1097 (11th Cir. 1995).

At least among the federal courts of appeals, substantial uncertainty remains concerning this Court's treatment, after *New York v. United States*, of the justiciability of Guarantee Clause claims. Despite the flurry of litigation after 1993 – in part attributable to a coordinated campaign by states to challenge the federal government's policies regarding illegal immigrants – no consistent view has emerged from the lower federal courts. Particularly on the question of whether Guarantee Clause claims brought by states (challenging federal action) should be treated differently than those initiated by individuals (contesting government conduct), no definitive guidance has been offered by this Court.

b. In the absence of such a clear directive, state tribunals have simply created their own Guarantee Clause jurisprudence. In dealing with these cases, state courts have been virtually indifferent to political question considerations and (when dealing with the actual merits of Guarantee Clause claims) often casual in appreciating the underlying purposes of this constitutional provision. The result has been a patchwork of decisions, a surprising number of which have decided that certain forms of state governmental structures and actions are inconsistent with a "republican form of government" and thus unconstitutional.[3]

[3] See *Morrissey v. State*, 951 P.2d 911, 916-17 (Colo. 1998) (initiative to oblige federal representatives to support term limits violated republican form of government); *In re Interrogatories* (continued...)

Aside from the South Carolina Supreme Court, as reflected in the opinion below, fourteen state supreme courts have considered Guarantee Clause claims and found them to be justiciable, even where initiated by private parties challenging state governmental action.[4] Those state supreme courts that

[3](...continued)
Propounded by the Senate, 536 P.2d 308, 315-18 (Colo. 1975) (doctrine of separation of powers essential to a republican form of government); *Beach v. Bradstreet*, 82 A. 1030, 1032 (Conn. 1912) ("A republican form of government forbids the raising of taxes for any but public purposes, and under article 4, § 4, of the Constitution of the United States, Connecticut is forever bound to maintain such form of government and cannot exercise legislative power inconsistent with it."); *Rice v. Foster*, 4 Del. 479, 487 (1847) (invalidating public referendum); *City of Cleveland v. Ruple*, 200 N.E. 507, 510 (Ohio 1936) (taxation without public purpose); *Board of Elections for Franklin County v. State ex rel. Schneider*, 191 N.E. 115, 122 (Ohio 1934) (state officer granted an extra term without an election); *Opinion to the Governor*, 183 A.2d 806, 811 (R.I. 1962) (state representatives given fractional votes; found inconsistent with republican government); *Heimerl v. Ozaukee County*, 40 N.W.2d 564, 567-68 (Wis. 1949) (taxation without public purpose).

[4] **Alabama**: *Opinion of the Justices*, 468 So.2d 883, 887 (Ala. 1985); *Cagle v. Qualified Electors of Winston County*, 470 So.2d 1208, 1210 (Ala. 1985); **Arkansas**: *E.E. Tucker Oil Co. v. Portland Bank*, 688 S.W.2d 293, 294 (Ark. 1985); **California**: *Ventura Group Ventures, Inc. v. Ventura Port Dist.*, 16 P.3d 717, 724 (Cal. 2001); *Amador Valley Joint Union High School Dist. v. State Bd. of Equalization*, 583 P.2d 1281, 1288-89 (Cal. 1978); **Colorado**: *Morrissey v. State*, 951 P.2d 911, 916-17 (Colo. 1998); *People v. Horan*, 556 P.2d 1217, 1220 (Colo. 1976); *In re Interrogatories* (continued...)

have harbored doubts about the justiciability of Guarantee Clause claims have, like their federal appeals court counterparts in the aftermath of *New York v. United States*, revised their positions, even while sometimes rejecting such claims on the merits. See, e.g., *Fraternal Order of Police Lodge No. 165 v. City of Choctaw*, 933 P.2d 261, 270-71 (Okla. 1997) ("Even if the issue presented in the present case is one which is justiciable under *New York v. United States*, . . . the cities' argument must fail."); *State v. Davis*, 943 P.2d 283, 286 (Wash. 1997).

But other courts, including the Supreme Courts of

[4](...continued)
Propounded by the Senate, 536 P.2d 308, 315-18 (Colo. 1975); **Connecticut**: *Beach v. Bradstreet*, 82 A. 1030, 1032 (Conn. 1912); *Appeal of Allyn*, 71 A. 794, 795 (Conn. 1909); **Delaware**: *Rice v. Foster*, 4 Del. (4 Harr.) 479, 487 (1847); **Georgia**: *Threatt v. Fulton County*, 467 S.E.2d 546, 550 (Ga. 1996); **Iowa**: *Eckerson v. City of Des Moines*, 115 N.W. 177, 181-82 (Iowa 1908); **Kansas**: *VanSickle v. Shanahan*, 511 P.2d 223, 235-42 (Kan. 1973); *Gleason v. Samaritan Home*, 926 P.2d 1349, 1359 (Kan. 1996); **Ohio**: *Fuldauer v. City of Cleveland*, 290 N.E.2d 546, 548-49 (Ohio 1972); *City of Cleveland v. Ruple*, 200 N.E. 507, 509 (Ohio 1936); *Board of Elections for Franklin County v. State*, 191 N.E. 115, 122 (Ohio 1934); **Oklahoma**: *In re Initiative Petition No. 348, State Question No. 640*, 820 P.2d 772, 779-81 (Okla. 1992); **Oregon**: *State v. Montez*, 789 P.2d 1352, 1377 (Or. 1990); *Kiernan v. City of Portland*, 112 P. 402, 403-04 (Or. 1910); *Kadderly v. City of Portland*, 74 P. 710, 719-20 (Or. 1903); **Rhode Island**: *In re Advisory Opinion to the Governor (Ethics Comm'n)*, 612 A.2d 1, 15-20 (R.I. 1992); *Opinion to the Governor*, 183 A.2d 806, 811 (R.I. 1962); **Wisconsin**: *City of West Allis v. County of Milwaukee*, 159 N.W.2d 36, 46 (Wis. 1968); *State ex rel. Thomson v. Zimmerman*, 60 N.W.2d 416, 419 (Wis. 1953); *Heimerl v. Ozaukee County*, 40 N.W.2d 564, 567-68 (Wis. 1949).

Washington and Oregon, have noted that this Court's decisions in *New York* and in *Pacific States* are not easily reconciled, and have called upon this Court to further clarify the doctrine of nonjusticiability of Guarantee Clause claims brought by private parties seeking to challenge state action. See *State v. Manussier*, 921 P.2d 473, 482 & n.66 (Wash. 1996) ("*Pacific* still represents good law, ... Although the Court's holding in *Pacific* has not been explicitly overruled, it has recently been called into question. See *New York v. United States*, 505 U.S. 144, 184 (1992) (noting that the Court has addressed the merits of claims founded on the Guarantee Clause, but has declined to resolve the question whether all claims under the Clause present nonjusticiable political questions)."); *State ex rel. Huddleston v. Sawyer*, 932 P.2d 1145, 1157-62 (Or. 1997) ("[I]n *New York*, the Court did not hold that any Guarantee Clause claim is justiciable. In addition, in *New York*, the issue arose in the context of whether a state could invoke the Guarantee Clause as a basis for limiting federal intrusion into state autonomy. The Court has shown no inclination to allow individual litigants to rely on the Guarantee Clause to challenge a state action on the basis that that action infringes on federal constitutional rights. We will not fail to follow the applicable holding in *Pacific Telephone* because of a factually distinguishable dictum contained in *New York*."); cf. *State v. Montez*, 789 P.2d 1352, 1377 (Or. 1990) (holding that *Pacific Telephone* applies only as a justiciability bar in federal courts, not state courts).

c. Where state supreme courts have considered the merits of Guarantee Clause arguments, they have employed a bewildering array of interpretive techniques to give those claims some substantive evaluation. The preferred approach, as reflected in the Colorado Supreme Court's decision in *In re Interrogatories*, 536 P.2d at 316-18, the Rhode Island Supreme Court's ruling in *In re Advisory Opinion*, 612 A.2d at 16-20,

and the Kansas Supreme Court's opinion in *VanSickle*, 511 P.2d at 235-47, has been to conduct a searching historical analysis of the original intent of the Guaranty Clause in order to ascertain what the Framing generation would have understood as being required aspects of republican government, and then to determine whether the challenged state government structure or conduct violates such a principle. In this way, the effect of the Guaranty Clause would be quite properly tied to those historically demonstrable and recognized core elements of republican government.

Other state courts have, regrettably, grounded their Guarantee Clause jurisprudence on far less firm foundations. Some courts have premised their rulings on an incomplete historical appreciation of the founding period, without recognizing the various ways that the Framers articulated a coherent vision of republican government. See, e.g., *Board of Elections*, 191 N.E. at 119-20 (citing only the Declaration of Independence for the proposition that elections are for set terms); *Morrissey*, 951 P.2d at 916-17 (citing only a dictionary definition of republican government). Yet other courts – including the South Carolina Supreme Court in the decision for which review is sought here, see App. 5a-8a – simply eschew any historical or originalist understanding of the Guarantee Clause, and proceed, instead, to apply a refracted vision of the right in question, by relying on inapposite or anachronistic authority.

4. In any event, this Court's review is required to settle whether, and to what extent, Guarantee Clause claims are justiciable. Petitioner will take the position that Guarantee Clause cases brought by parties seeking to challenge state conduct are eligible for disposition in precisely the context raised here: where such claims are referred to state courts for resolution by virtue of their concurrent jurisdiction under 42

U.S.C. § 1983. In these circumstances, no absolute bar to justiciability should be enforced. Rather, as this Court intimated in *Baker v. Carr*, the preferred approach would be to assess the specific claims brought and determine whether, in the particular case, political questions are presented. See 369 U.S. at 210-11 ("Much confusion results from the capacity of the 'political question' label to obscure the need for case-by-case inquiry."). This may well entail a court weighing *Baker*'s six-prong elements in order to determine whether ruling on the merits of a Guarantee Clause case requires a court to impermissibly depart from its proper judicial function. See id. at 217; see also *United States v. Munoz-Flores*, 495 U.S. 385, 389-96 (1990) (holding that an individual claim brought pursuant to the Origination Clause, challenging a criminal assessment, did not present a nonjusticiable political question).

State tribunals should apply a uniform standard of decision for Guarantee Clause cases, subject only to this Court's supervisory review powers. That this Court needs to articulate the proper mode of analysis to be applied in Guarantee Clause cases is all the more apparent where, as here, at stake is a significant federal right to be vindicated under section 1983, see App. 3a, 5a, 9a, and that doubts about the justiciability of such cases assuredly colors and distorts the substantive analysis employed by state tribunals. See App. 9a n.7. In short, this Court needs to definitively indicate whether the Guarantee Clause is a legitimate source to constrain the taxation power of state governments, and under what modalities such cases can be pursued in state courts.

B. The Ruling Below, that a Continued Practice of State Taxation without Representation is Constitutionally Permissible, Conflicts with Other Holdings and Empties the Guarantee Clause of Any Meaning.

Given its uncertainty about the justiciability of the Guarantee Clause and the proper scope of analysis for claims brought under that constitutional provision as federal rights enforceable under 42 U.S.C. § 1983 (2000), it is perhaps no surprise that the South Carolina Supreme Court reached the conclusion it did that a continuing state governmental practice of taxation without representation is not inconsistent with a "republican form of government." Without dwelling on the substantive doctrinal conclusions of the ruling below, it is manifest that the South Carolina Supreme Court committed a number of methodological mistakes in its analysis of Petitioners' Guarantee Clause claims. These errors place the decision in conflict with a number of rulings by this Court and other state supreme courts, independently meriting review here.

1. a. The South Carolina Supreme Court began its discussion with the observation that "[b]y its express terms, th[e] [Guaranty] clause does not guarantee against taxation without representation." App. 5a. Yet, this is quite beside the point. The Guaranty Clause refers to "every state in this Union [having] a republican form of government." U.S. CONST. Art. IV, § 4. The provision does not purport to define "republican . . . government." The implication of the ruling below is that the Clause can have no substantive content because it does not specify the elements or components of republican government.

A number of state supreme courts have taken a diametrically opposite view, holding that the Guarantee Clause requires that state governments respect separations of power

between branches,[5] that voters have the opportunity to vote for public officials for set terms,[6] that legislators have an equal vote,[7] that the discretion of legislators not be constrained by instructions from the electorate,[8] and that taxes be raised only for public purposes.[9] Obviously, none of these elements of republican government are mentioned in the body of the Guarantee Clause, and, indeed, some of them may only be generally inferred from the structure of the federal Constitution or from state constitutions.

If taken at face value, then, the South Carolina Supreme Court's ruling would render the Guarantee Clause a *substantive* dead-letter, in addition to being judicially unenforceable This surplusage theory of the Guarantee Clause is untenable. If this Court's decisions in *Baker v. Carr* and *New York v. United States* have any real import, despite their studied ambiguity as to the modalities of justiciability, it is that the Guarantee Clause captures within the constitutional text a vital bargain between the federal union and several states, protecting the interests of both realms of government, as well as of the interests of their respective citizens.

[5] *In re Interrogatories Propounded by the Senate*, 536 P.2d 308, 315-18 (Colo. 1975).

[6] *Board of Elections for Franklin County v. State ex rel. Schneider*, 191 N.E. 115, 122 (Ohio 1934).

[7] *Opinion to the Governor*, 183 A.2d 806, 811 (R.I. 1962).

[8] *Morrissey v. State*, 951 P.2d 911, 916-17 (Colo. 1998); *Rice v. Foster*, 4 Del. (4 Harr.) 479, 487 (1847).

[9] *Beach v. Bradstreet*, 82 A. 1030, 1032 (Conn. 1912); *City of Cleveland v. Ruple*, 200 N.E. 507, 509 (Ohio 1936); *Heimerl v. Ozaukee County*, 40 N.W.2d 564, 567-68 (Wis. 1949).

b. To the extent that the South Carolina Supreme Court can be seen from its decision as pronouncing an unachievable standard for the articulation of federal rights enforceable under section 1983, App. 3a n.5, 5a, 9a, its ruling appears also to squarely contradict the precedents of this Court. See, e.g., *Dennis v. Higgins,* 498 U.S. 439, 444-45 (1991); *Golden State Transit Corp. v. Los Angeles,* 493 U.S. 103, 105 (1989) (The Court has "repeatedly held that the coverage of [§ 1983] must be broadly construed."); *Monell v. New York City Dept. of Social Services,* 436 U.S. 658, 684 (1978) (noting that the legislative history of section 1983 stresses that, as a remedial statute, it should be "'liberally and beneficently construed.'") (quoting Rep. Shellabarger, Cong. Globe, 42d Cong., 1st Sess., App. 68 (1871)).

Petitioners are mindful, of course, that section 1983 plaintiffs are required to specify the federal constitutional rights in question. See *Albright v. Oliver*, 510 U.S. 266, 271 (1994) (citing *Baker v. McCollan*, 443 U.S. 137, 140 (1979); *Graham v. Connor*, 490 U.S. 386, 394 (1989)). Unlike vague invocations of "substantive due process rights," which this Court has previously criticized as inadequate, id. at 271, see also *Wright v. Roanoke Redev. Housing Auth.*, 479 U.S. 418, 431-32 (1987), the plaintiffs here articulated a specific right: to be free of a systematic practice by state and local government entities of raising taxes without recourse to elected bodies consisting of politically-accountable officials. See App. 12a, 14a, 16a. Despite the South Carolina Supreme Court's attempt to dismiss this as a mere "slogan" or "principle," App. 5a, Petitioners have properly raised a federal constitutional right, protectable under the Fourteenth Amendment and Guarantee Clause.

2. The second methodological mis-step apparent in the ruling below is its selection of relevant sources and materials in

determining whether taxation without representation is permissible under the Guarantee Clause. Had the South Carolina Supreme Court followed this Court's guidance in *Minor v. Happersett*, 88 U.S. at 176-77, it would have reviewed original source material from the Framing period in order to ascertain whether taxation by regularly elected and accountable officials was considered an aspect of republican government. Indeed, this privilege was featured as the first paragraph of the 1628 Petition of Right and appeared in the Declaration of Rights of William and Mary, 1689, 2 W. & M., ch. 2, art. 4. Had the court below canvassed state constitutions at the time of the Framing, it would have found no less than five states had adopted substantially similar and specific constitutional provisions guaranteeing this right.[10] The federal Constitution of 1787, while having no provision identical in these terms, did have a clause requiring that all revenue bills originate in the House of Representatives, U.S. Const. art. I, § 7, cl. 1, and the original intent of this requirement (replicated in most state constitutions of the period) was reflective of the no taxation without representation guarantee. See *Skinner v. Mid-Amerieа Pipeline Co.*, 490 U.S. 212, 221 (1989) ("[T]he Origination Clause . . . embod[ied] the Framers' concern that persons elected directly by the people have initial responsibility over taxation . . . .").

Instead of evaluating these original sources, the court

[10] See MD. CONST Decl. Of Rights. art. XII (1776); MASS. CONST. pt. I, art. XXIII (1780); N.H. CONST. pt. 1, art. XXVIII (1784 & 1792); N.C. CONST. art. XVI (1776); PA. CONST. § 41 (1776). See also GA. CONST. pmbl. (1777); N.Y. CONST. pmbl. (1777); S.C. CONST. pmbl. (1776) (for preambular provisions which specifically criticized the British Crown's taxation without representation). See also N.Y. Bill of Rights Act, 1787, ¶ 12.

below had recourse to what it regarded as binding precedents of this Court questioning the status of the taxation with representation doctrine. But all of the cases relied upon, App. 5a-8a, involve taxation within the District of Columbia or federal territories, and for this reason alone are constitutionally inapposite. Taxation within these areas is reserved as a plenary power of Congress, U.S. CONST. art. I, § 8, cl. 17 & art. IV, § 3, cl. 2; the Guarantee Clause by its own terms applies only to states. See *Downes v. Bidwell*, 182 U.S. 244, 278-79 (1901).

Whatever sweeping statements made in these cases concerning the authority of Congress to tax those without representation in its body, those decisions are simply not relevant where what is being challenged is a pattern and practice of a *state* government permitting the levying taxes against citizens and residents through unelected and unaccountable bodies, or for improper purposes. In this respect, the decision below contradicts that of five other state supreme courts that have held that taxation without representation or for non-public purposes violates the Guarantee Clause. See *Opinion of the Justices*, 468 So. 2d 883, 887 (Ala. 1985) (deciding that proposed constitutional amendment did allow for taxation with representation); *Beach v. Bradstreet*, 82 A. 1030, 1032 (Conn. 1912) (statute authorizing revenue for impermissible purpose found unconstitutional); *City of Cleveland v. Ruple*, 200 N.E. 507, 509 (Ohio 1936) (same); *In re Initiative Petition*, 820 P.2d 772, 779-81 (Okla. 1992) (holding that proposed constitutional amendment, permitting raising of revenue by initiative, was consistent with taxation by representatives); *Heimerl v. Ozaukee County*, 40 N.W.2d 564, 567-68 (Wis. 1949) (taxes raised for private benefit held unconstitutional). Moreover, none of this Court's rulings can be seen as permitting unelected bodies to impose taxes. It is the nature of the taxing authority that is the essential part of the

analysis, not the identity of the taxpayer.

A federal appeals courts has also recognized these same principles, although declining to intervene in a school funding dispute:

> In language of majestic simplicity, our Constitution provides that "The United States shall guarantee to every State in this Union a Republican Form of Government. . . ." U.S. CONST. Art. IV, § 4. A "republican" form of government, as Madison suggested in Number Ten of the Federalist Papers, is "a Government in which the scheme of *representation* takes place." (Emphasis supplied.) In few (if any) areas of government is Madison's "scheme of representation" more important than it is in the area of government finance and taxation. A principal cause of our Revolutionary War, after all, was the imposition of taxes without representation. The concept that "taxation without representation is tyranny" was one for which a number of the Framers had put their very lives on the line. Our Constitution was not adopted to perpetuate the evil that led us to break our ties with the British Crown.

Kelley v. Metropolitan County Bd. of Education of Nashville and Davidson County, 836 F.2d 986, 997 (6th Cir. 1987).

3. If this Court, in the wise exercise of its certiorari authority, decides to entertain the threshold question of Guarantee Clause justiciability, and concludes that Petitioner's claims can be heard, it should also rule on whether a state government's continued practice of suffering its citizens to be taxed through bodies that are not elected or politically accountable is offensive to a "republican form of government." At issue in this case is no mere Revolutionary-era slogan, or some constitutional anachronism. Rather, at stake is the enduring promise of republican government, and the

permissible avenues by which it can be effectively guaranteed.

CONCLUSION

The Petition ought to be GRANTED.

Respectfully submitted,

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